

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

DAIMLERCHRYSLER CORPORATION,

Plaintiff-Appellant/Cross-Appellee,

v

AJILON SERVICES, INC.,

Defendant-Cross-Plaintiff-Appellee,

and

ST. PAUL FIRE AND MARINE INSURANCE  
COMPANY,

Defendant-Cross-Defendant-  
Appellee/Cross-Appellant.

UNPUBLISHED

March 9, 2004

No. 241954

Wayne Circuit Court

LC No. 01-142240-CK

---

Before: Hoekstra, P.J., and Sawyer and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right the order denying plaintiff's motion for summary disposition, dismissing plaintiff's complaint, and granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants. We affirm in part and reverse in part.

The underlying facts of this case are generally not in dispute. Plaintiff and defendant Ajilon entered into an agreement (purchase order agreement) under which Ajilon agreed to supply its employees as administrative support staff (supplemental employees) to work under the direction of plaintiff's executives. Plaintiff paid Ajilon for the services and the employees remained Ajilon employees and received their salaries and benefits from Ajilon. Trista Nicholl was an Ajilon employee who was assigned to work for plaintiff under the purchase order agreement. On August 18, 2000, she had been given permission to take one of plaintiff's vehicles home for the weekend. After receiving and parking the vehicle in the parking lot, Nicholl was walking back to her office when Harold Carleton, a Chrysler employee, struck her with his Chrysler owned vehicle as Nicholl attempted to cross at a crosswalk. Nicholl sustained injuries and received worker's compensation benefits from defendant St. Paul, which was Ajilon's insurance carrier.

In June 2001, Nicholl initiated action (the underlying action) against Carleton, alleging she was injured by Carleton's negligence. Nicholl named only Carleton in this lawsuit, not plaintiff. Plaintiff, however, provided Carleton with a defense in the action because Carleton was insured through plaintiff's self-insurance program. Plaintiff tendered a defense of Nicholl's claim to defendants Ajilon and St. Paul but they refused to accept plaintiff's tender.

In December 2001, plaintiff filed the instant suit against defendants Ajilon and St. Paul, primarily for their failure to defend and indemnify plaintiff in the underlying action. Plaintiff thereafter filed a motion for summary disposition, principally relying on the purchase order agreement to assert that plaintiff was entitled to indemnification and that Ajilon breached the purchase order agreement by failing to include plaintiff as a named insured on its insurance policy with St. Paul. In its claims against St. Paul, plaintiff asserted that it was entitled to summary disposition as an intended third-party beneficiary of the insurance policy. In response, Ajilon and St. Paul asserted that the indemnification clause in the purchase order agreement was not applicable because Nicholl did not sustain injuries arising out of the performance of the work ordered by the purchase order agreement, and because plaintiff was not named as a party in the underlying action. Defendant St. Paul also filed a motion for summary disposition. After a hearing on the motions and after confirming that plaintiff was not a party in the underlying action, the trial court denied plaintiff's motion for summary disposition and granted dismissal of plaintiff's claims because plaintiff had not been sued by Nicholl in the underlying action, and therefore, neither Ajilon nor St. Paul had a duty to indemnify plaintiff.

On appeal, a trial court's grant or denial of summary disposition is reviewed de novo. *First Public Corp v Parfet*, 468 Mich 101, 104; 658 NW2d 477 (2003). The proper interpretation of a contract, which is a question of law, is also reviewed de novo. *Id.* This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

Plaintiff first asserts that the trial court erred in granting defendant Ajilon summary disposition because, under the indemnification clause in the purchase order agreement, Ajilon agreed to defend and indemnify plaintiff against any claim arising out of the contracted work, and thus had a duty to defend and indemnify plaintiff in the underlying action.

Indemnity contracts are governed by the following guidelines:

An indemnity contract is construed in accordance with the rules for the construction of contracts generally. The cardinal rule in the construction of indemnity contracts is to enforce them so as to effectuate the intentions of the parties. Intention is determined by considering not only the language of the contract but also the circumstances surrounding the contract, including the situation of the parties. Indemnity contracts are construed most strictly against the party who drafts them and against the party who is the indemnitee. [*Chrysler*

*Corp v Brencal Contractors Inc*, 146 Mich App 766, 816-817; 381 NW2d 814 (1985) (citation omitted).]

In this case, the pertinent language of the indemnification clause in the purchase order agreement provides:

Contractor [defendant Ajilon] shall assume *all risk of . . . of bodily injury . . . of persons . . . used or employed on or in connection with the work . . . and of all . . . bodily injury . . . wherever located, resulting from or arising out of any action, omission or operation under the contract or in connection with the work.*

Seller [defendant Ajilon] . . . shall protect, defend, hold harmless, and indemnify [plaintiff] from and against any and all loss, cost, damage, expense, claims, or legal actions . . . which may be sustained or claimed by any person or persons . . . *arising out of or related to the performance of any work in connection with this contract . . . .* This indemnification shall include, but shall not be limited to . . . the obligation by contractor [defendant Ajilon] to protect, defend, hold [harmless], and indemnify [plaintiff] from and against any and all claims for bodily injury . . . based upon or alleged to have arisen out of (1) the sole active or passive negligence of [plaintiff] . . . and contractor shall, at its own cost and expense, defend any such *claims and any suit, action or proceeding which may be commenced thereunder, and contractor shall pay any and all judgments which may be recovered in any such suit, action, or proceeding*, and any and all expense, including but not limited to, costs, attorneys' fees, and settlement expenses which may be incurred therein.

The term "all" in an indemnity clause has been interpreted to provide for the broadest possible indemnification. *Triple E Produce Corp v Mastronardi*, 209 Mich App 165, 173; 530 NW2d 772 (1995). In light of the inclusive language of the purchasing order agreement, we find that Nicholl's injuries fell within the indemnification clause. Contrary to Ajilon's assertions, the plain language of the indemnity clause does not require that the personal injury occur while the actual work is being performed. See e.g., *Daimler Chrysler Corp v G-Tech Professional Staffing Inc*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2003).

Further, we reject the assertion that plaintiff was not entitled to indemnification because it volunteered to assume liability of its employee's defense even though plaintiff had not been sued. The specific language in the indemnification clause does not limit plaintiff's right to indemnification to only legal proceedings. Indeed, the indemnification clause allows plaintiff to be indemnified for *any* loss. *Wausau Underwriter Ins Co v Ajax Paving Industries, Inc*, 256 Mich App 646, 650; 671 NW2d 539 (2003). Based on the plain language of the agreement, plaintiff was entitled to indemnification from defendant Ajilon. Thus, we conclude the trial court erred in denying plaintiff summary disposition with regard to its indemnification claim against defendant Ajilon and in granting dismissal in favor of defendant Ajilon.

Next, plaintiff raises several issues concerning the insurance policy between St. Paul and Ajilon. Plaintiff first asserts St. Paul's duty to defend plaintiff's employee was never triggered because defendant Ajilon breached the purchase order agreement when it failed to name plaintiff as an additional insured on the insurance policy. "A trial court may grant summary disposition

of a breach of contract claim only if terms of the contract are not subject to two or reasonable interpretations.” *BPS Clinical Laboratories v Blue Cross and Blue Shield of Michigan*, 217 Mich App 687, 700; 552 NW2d 919 (1996). The insurer’s duty to defend under an insurance contract is measured by the allegations in the pleadings of the person who is suing the insured.” *Dochod v Central Mutual Insurance Co*, 81 Mich App 63, 66; 264 NW2d 122 (1978). However, “if no theories of recovery fall within the policy, an insurer does not have a duty to defend.” *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 480-481; 642 NW2d 406 (2001).

In the underlying action, plaintiff’s employee was sued for negligently driving a motor vehicle. Even assuming, without deciding, that plaintiff’s employee would have been covered under the insurance policy, the automobile exclusion in the policy would preclude coverage. The policy states in relevant part

**Exclusions – What This Agreement Won’t Cover**

\*\*\*

**Auto.** We won’t cover bodily injury . . . or medical expenses that result from the:

Ownership, maintenance, use or operation . . . of any auto owned, operated, rented, leased or borrowed by any protected person.

In light of this exclusion, even if defendant Ajilon had named plaintiff as an additional insured on the policy, the policy precluded coverage. Thus, we are not persuaded that plaintiff is entitled to appellate relief on this basis. *Auto Club Group Ins Co, supra* at 480-481.

Plaintiff next asserts that it is entitled to enforce the policy as a third-party beneficiary. The third-party beneficiary statute, MCL 600.1405, provides in pertinent part:

Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

(1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

The Supreme Court has construed the third-party beneficiary statute to provide that only intended third-party beneficiaries, and not incidental beneficiaries, may sue for a breach of a contractual promise in their favor. *Schmalfeldt v Northe Pointe Insurance Co*, 469 Mich 422, 427-428; 670 NW2d 651 (2003); *Koenig v South Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999).

In this case, the insurance policy required that an indemnitee had to be sued before defendant St. Paul had an obligation to defend. Specifically, the insurance policy contained the following, in pertinent part:

. . . . We'll have the duty to defend the indemnitee [under a covered contract] against the claim or suit if:

- The injury or damage is covered by this agreement;
- The claim or suit is made or brought against that protected person *and the indemnitee*;

In light of this language, which specifically excludes plaintiff from coverage under the facts of the instant case, we are satisfied that plaintiff failed to establish that it was entitled to enforce the policy as an intended third-party beneficiary. *Schmalfeldt, supra*. Thus, under the circumstances, we conclude the trial court properly granted summary disposition to defendant St. Paul.

Because we conclude that the trial court erred in dismissing this case in favor of defendant Ajilon, we need not address plaintiff's remaining issues or defendant St. Paul's issues on cross-appeal. We reverse the order denying plaintiff summary disposition with regard to its indemnification claim against defendant Ajilon and granting dismissal in favor of defendant Ajilon, but affirm the order granting summary disposition to defendant St. Paul.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra  
/s/ David H. Sawyer  
/s/ Hilda R. Gage